D. CELLULAR AND PCS PROVIDERS COMPETE FOR THE SAME CUSTOMERS

1. The services offered are the same, as evidenced, for example, by the Washington/Baltimore area customer brochures of Sprint Spectrum and Cellular One which are attached hereto at Exhibit 4.

2. The handsets utilized by customers will often work on both cellular and PCS networks.

IV. THE NEED FOR IMMEDIATE INTERIM RELIEF

- Whether the Commission proceeds on the basis of: (a) the voluminous record already before it regarding the lack of a need for the structural separation rule and the benefits which would flow from its elimination (as such record may be supplemented by a new, expedited request for comments in this proceeding), or (b) the rationale employed by the 6th Circuit regarding the similarity of PCS and cellular and the requirements of Section 332 of the Act, the result should be the same -- the elimination of the rule (in whole or in part).

- While SBC believes that the Commission already has before it ample evidence to eliminate Section 22.903 (in whole or in part) without further notice and comment, if the Commission decides that further comments are warranted -- a process which must be highly expedited in light of the 6th Circuit's decision -- the Commission should immediately grant various forms of interim relief.

° The interim relief which SBC (and others) seek at this time is necessary in light of the dynamic forces currently at work in the telecommunications marketplace, which will be greatly enhanced by the passage of the new legislation; these include:

(a) the fact that numerous competitors of the BOCs are offering various forms of combined services and "one-stop shopping", which the BOCs' customers want but which the BOCs may not now provide to their customers;

(b) the emergence of PCS which can be offered on an integrated basis with local exchange service; and

(c) the offering of wireless services (on a facilities-based and/or resale basis) by the large interexchange carriers.

° Such interim relief is further warranted since, even if the Commission were to conclude -- in connection with a new expedited comment process -- that some forms of separation between BOC local exchange and cellular services are appropriate, it is inconceivable that the FCC would continue to endorse the "maximum separation" requirements of Section 22.903, in light of the positions the Commission has taken in other recent proceedings; therefore, at least certain aspects of Section 22.903 should be waived and modified immediately so that the BOCs can respond to the current marketplace forces and provide the services their customers desire.

° The interim relief which SBC believes the FCC should grant immediately (or at the outset of a new, expedited comment process) includes:

A. MOST IMPORTANTLY, a waiver -- applicable to all BOCs -- of the following subsections of § 22.903:

1. Subsection (b)(2) requiring separate officers;
2. Subsection (b)(3) requiring the employment of separate operating, marketing, installation and maintenance personnel; and
3. Subsection (b)(4) requiring the utilization of separate computer and transmission facilities.
4. In addition, the Commission should amend the definition of "BOC" for purposes of subsection (d) to correspond to the definition in the prior Section 22.901, which defined a "BOC" as being the affiliate which provides the landline local exchange telephone service.[3]

B. The extension of SBMS's CLLE waiver to the other BOC cellular affiliates.

---

[3] The Rules provide that the Commission may grant such waivers and amend its Rules on its own motion. See 47 C.F.R. §§ 1.3 and 22.119.

° The grant of such interim relief will enable the BOCs immediately to bring to consumers the benefits of integrated services and one-stop shopping and service which the Commission has recognized on numerous occasions.

° Most recently, in its Memorandum Opinion and Order on Reconsideration of its order authorizing the transfer of McCaw's cellular licenses to AT&T (MO&O on Recon., File No. ENF-93-44, FCC 95-425 (released Oct. 30, 1995)), the Commission stated that:

(a) "We believe that the benefits to consumers of 'one-stop shopping' are substantial. . . ." (MO&O on Recon. at ¶ 15)

(b) "The ability of a customer, especially a customer who has little or infrequent contact with service providers, to have one point of contact with service providers, to have one point of contact with a provider of multiple services is efficient and avoids the customer confusion that would result from having to contact various departments within an integrated, multi-service telecommunications company, such as AT&T/McCaw, to obtain information about the various services AT&T/McCaw provides." (Id.)

(c) "A customer who contacts AT&T/McCaw about interexchange service, even for use with a BOC's cellular service, should not be barred from obtaining, at the same time and place, information about CPE, enhanced services, or cellular service that AT&T/McCaw could also offer that customer." (Id.)

° Customers will benefit from new services including, for example:

(a) The offering of a single voice mailbox to which all calls are routed regardless of the mode of transmission involved;

(b) The availability of services and devices such as FreedomLink™ or FreedomPlus™ offered from a single retail source;

(c) A single bill and the ability to pay it with a single check; and

(d) A single call and point of contact for repair, maintenance and billing problems.

° By eliminating the substantial and unnecessary costs of structural separation, SBC can be a more efficient, cost effective competitor, which will directly benefit consumers through new services, reduced cost and ultimately the opportunity for lower prices.

IV. CONCLUSION

- For the foregoing reasons, the Commission should:

  (a) reject any effort to broaden its inquiry beyond that called for by the Sixth Circuit; and

  (b) promptly issue a further notice of proposed rulemaking directed specifically at eliminating Section 22.903 (in whole or in part).[4]

- Either before, or at the time the Commission seeks additional comment in this proceeding, it should grant interim relief on its own motion, consisting of:

  (a) a waiver applicable to all BOCs of subsections (b)(2), (b)(3) and (b)(4) of Section 22.903;

  (b) an amendment of the definition of "BOC" for purposes of subsection (d), to make clear that "BOC" only means the LEC affiliate (as was the case under former Section 22.901); and

  (c) an extension to all BOC cellular affiliates of the recent CLLE waiver granted to SBMS.

---

[4] A draft NPRM, modeled on that used in the Fin-Syn proceeding, is attached hereto at Exhibit 2.

EXHIBIT 1 -- Fin-Syn NPRM

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-162

In the Matter of

Evaluation of the Syndication and
Financial Interest Rules

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 31, 1992; Released: December 31, 1992

Comment Date: February 1, 1993
Reply Comment Date: February 16, 1993

By the Commission: Chairman Sikes issuing separate statement.

I. INTRODUCTION

1. On November 5, 1992, the U.S. Court of Appeals for the Seventh Circuit in *Schurz Communications, Inc., et al., v. FCC (Schurz)*[1] vacated this Commission's decision relaxing and modifying its financial interest and syndication rules.[2] The Court invalidated the Commission's decision except insofar as the Court found it to abrogate the original (1970) financial interest and syndication rules.[3] The Court stayed its decision for 120 days, remanding the matter to the Commission for further proceedings consistent with its ruling. In this *Second Further Notice of Proposed Rulemaking* we seek comment with regard to how we should resolve the Court's concerns.

II. BACKGROUND

2. The financial interest and syndication rules, originally adopted in 1970, were designed to limit the power of the broadcast television networks over television programming. The rules prohibited the television networks from acquiring any financial interests in the subsequent broadcast of outside produced programs (*i.e.*, programs not solely produced by the network) other than the right to exhibit such programs on the network. The rules also prohibited the networks from actively engaging in the domestic syndication business, or from having any ongoing interest in the syndication of programs for non-network broadcast distribution. Networks were allowed, however, to syndicate outside the United States programs that they solely produced or that were produced by foreign entities.

3. In 1991, this Commission determined, after an extensive notice and comment rulemaking proceeding and an *en banc* hearing, that it should relax, but not repeal the financial interest and syndication rules. Accordingly, the 1991 rules: (1) eliminated restrictions on network ownership and syndication of network programming as to all dayparts and all programs other than prime time entertainment programming; (2) allowed networks to retain all rights in all "in-house" productions; (3) permitted networks to fill up to, but not more than, 40 percent of their prime time entertainment schedule with "in-house" productions; (4) allowed networks to acquire all rights, including financial interests, domestic syndication rights and foreign syndication rights, in outside productions on their own or another network, subject to certain safeguards; (5) allowed networks to engage in foreign syndication of network programs without limitation; and (6) allowed limited network participation in first-run syndication. The Commission also adopted a new definition of "network" and imposed certain behavioral safeguards.[4]

III. DISCUSSION

4. The Court supported two important aspects of the Commission's reasoning in this proceeding. First, the Court agreed with the Commission's determination that the structure of the television industry has changed significantly since the financial interest and syndication rules were adopted in 1970. *Schurz* at 4. Second, the Court agreed that the Commission has the authority to regulate the networks in accordance with the public interest, convenience, or necessity and, thus, has the authority to restrict network programming activities so as to foster a diversity of programming sources and outlets even if the networks were without any market power. *Schurz* at 8-10.

5. The Court stated, however, that while the modified rules appear plausible, the decision did not address all the objections to the Commission's approach that were raised in the record of this proceeding. The Court concluded, therefore, that the Commission's justification for the 1991 rules was inadequate. The Court remanded the decision to give the Commission an opportunity to better articulate its justification. The Court opined that such a proceeding could result in significant modifications in the rules. *Schurz* at 12.

6. The Court identified several areas warranting further explanation. It stated that the Commission did not respond to the networks' objection that the 1991 rules do not increase the networks' access to the programming market and may decrease it. The Court noted, for example, that the networks state that the 40 percent limitation on the amount of prime-time entertainment they can supply from in-house production is a new restriction, having no counterpart in the original rules.[5] *Schurz* at 13.

---

[1] *See Schurz Communications, Inc., et al., v. Federal Communications Commission and the United States of America*, Nos. 91-2390, *et al.*, slip opinion (7th Cir., November 5, 1992), and *modified*, (December 7, 1992).

[2] *Report and Order* in MM Docket No. 90-162, 6 FCC Rcd 3094 (1991), Recon. granted in part/denied in part, 7 FCC Rcd 345 (1991).

[3] The Commission had expressly advised the Court that it had no independent intention to and, in fact, had not repealed the 1970 rules in its *Order*, *Public Notice*, FCC 92-520 (released November 20, 1992) (Chairman Sikes and Commissioner Quello dissenting and issuing statements).

[4] *See* 47 CFR §§73.658(k), 73.658-73.662, 73.3526(a)(11) (1991).

[5] We note that neither the 1970 rules nor the 1983 *Tentative*

7. Further, the Court opined that the 1991 rules appear to harm rather than to help outside producers as a whole, especially the smallest and least able to bear risk, by reducing their bargaining options. The Court also stated that the Commission's decision did not fully explain how the 1991 rules prevent networks from extracting financial interests or syndication rights from outside producers. In particular, it questioned whether the new safeguards (*e.g.*, the 30-day phased negotiations) could provide meaningful protection against extraction. *Schurz* at 16.

8. The Court also stated that the Commission failed to respond to the argument that its rules limit competition with the established networks, thereby limiting rather than promoting diversity. Specifically, the Court noted that the 1991 rules limit Fox Broadcasting Company to supplying no more than 15 hours of programming to its affiliates if Fox is to remain exempt from the 1991 rules. Thus, the Court found these rules to weaken Fox's incentives to furnish prime-time programming to its affiliates, many of whom are traditionally weak UHF stations, which appeared contrary to the Commission's desire to strengthen such stations. *Schurz* at 17-18.

9. The Court also found that the Commission's *Order* did not adequately address the 1983 *Tentative Decision and Request for Further Comments* in Docket 82-345,[4] and its legal significance as a Commission precedent. The Court said that the Commission should have better explained the differences between the 1983 *Tentative Decision* and the 1991 *Order*. Finally, the Court said that while the Commission's *Order* states that a primary purpose of the 1991 rules is to promote "diversity", the Commission did not define the term nor adequately explain how the 1991 rules promote diversity. *Schurz* at 19. Accordingly, we seek specific comment on whether and how the 1991 rules are likely to preserve or enhance diversity of prime time broadcast television programming services and outlets.

10. The Court conceded that the arguments raised by the Justice Department, the networks and others with respect to the effect of the rules on competition, risk-sharing and diversity may be speculative, theoretical or wrong. These arguments were, however, sufficiently persuasive, in the Court's opinion, to have placed a burden of explanation that the Commission did not meet. In remanding the matter to the Commission, the Court suggested that we could seek to "rejustify" the 1991 rules or, in the alternative, draft new rules. The Court imposed a deadline of 120 days. The Court noted that the Commission may ask the Court for a stay, but, failing that, all Commission financial interest and syndication rules would be eliminated after 120 days. In compliance with the Court's mandate, we intend to reexamine the extensive record already compiled with a view toward reconciling new or revised rules, if any, with the Court's concerns. Commenters are invited to submit new information in support of the 1991 rules or, in the alternative, to propose a revised set of financial interest and syndication rules. Comments should not merely reiterate parties' positions already on the record, but should instead respond specifically and directly to the Court's opinion and the appropriate Commission response. In addition, we will consider the impact of regulatory changes and marketplace developments that have occurred during the intervening period. For example, commenters may want to assess the impact of the Commission's modified network-cable rules,[5] or the program access and industry structural review initiatives required by the 1992 Cable Act.[6] In this regard, commenters are invited to assess the need for a revised review period or the adoption of a presumption of sunset of any future rules in light of the Court's remand. We particularly encourage parties to consolidate their pleadings whenever possible.

IV. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

11. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Second Further Notice of Proposed Rulemaking*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Second Further Notice of Proposed Rulemaking*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

B. Ex Parte

12. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. Sections 1.1202, 1.203, and 1.206(a).

C. Comment Procedures

13. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **February 1, 1993**, and reply comments on or before **February 16, 1993**. To file formally in this proceeding, you must file an original plus five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

Decision and Request for Further Comments permitted network domestic syndication of any programming. The 1991 rules relaxed the prior syndication prohibition, but invoked a scheduling safeguard as an interim measure.

[4] 94 FCC 2d at 1063.

[5] *See Report and Order* in MM Docket No. 82-434, 7 FCC Rcd 6156 (1992), *reconsideration pending*.

[6] *See*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. (1992).

14. The Commission must reach a decision in an expeditious manner, in light of the 120-day deadline imposed by the Court. Thus, comments on the issues raised in this *Second Further Notice of Proposed Rulemaking* shall not exceed thirty double-spaced typed pages, and reply comments shall not exceed twenty double-spaced typed pages.

D. Ordering Clauses

15. Authority for this proposed *Second Further Notice of Proposed Rulemaking* is contained in Sections 4(i) and (j), and 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(i), 303(r), 313 and 314.

16. For further information on this proceeding, contact Judith Herman, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. *Reason for action.* This *Second Further Notice of Proposed Rulemaking* is initiated to obtain comment regarding the appropriate action the Commission should take in response to the Court's remand of the Commission's decision in the *Order* in this proceeding.

II. *Objectives.* The Commission seeks to review and perhaps modify its 1991 financial interest and syndication rules in light of the Court's decision.

III. *Legal basis.* Action as proposed for this rulemaking is contained in Sections 4(i), 4(j), 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(i), 303(r), 313 and 314.

IV. *Reporting, recordkeeping and other compliance requirements.* None.

V. *Federal rules which overlap, duplicate or conflict with this rule.* None.

VI. *Description, potential impact and number of small entities affected.* Any rule changes in this proceeding could affect television program producers, television networks and their affiliate stations, non-network television stations, cable networks, cable television program producers, cable television networks and cable television operators. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

VII. *Any significant alternatives minimizing impact on small entities and consistent with stated objective.* None.

STATEMENT OF FCC CHAIRMAN ALFRED C. SIKES

Regarding the Reassessment of the "Financial Interest and Syndication" Rule

I continue strongly to believe that the Government should not be involved in commercial battles between television networks and the producer community in general – especially the big multinational entertainment companies.

I can hypothesize, however, sound public policy reasons why some limited Government role might be warranted if it were clearly shown there is no other means of fostering more genuine program diversity. Consequently, commenters should address – and debate should surround – the question whether the networks, if they were accorded free rein, would be more or less hospitable to prospective or nascent producers, especially those with new programming ideas. If networks are likely to be less hospitable, commenters should then recommend reasonable steps this agency might take to ensure an environment that is more conducive to allowing prospective or nascent producers to make a contribution.

It may well be that there is no good reason to assume any Government rules would be publicly beneficial – or, more accurately, work markedly better than a marketplace solution. Markets need not work better than regulation to be desirable; all markets need do is work as effectively as regulation and, as anyone exposed to the regulatory process appreciates, it is not hard to work "as effectively" as regulation. We should, however, endeavor to explore fully this one question of how best to foster a program production environment conducive to a diversity greater than we enjoy today. Comments on this point, accordingly, would be welcome.

EXHIBIT 2 -- Draft Section 22.903 NPRM

D R A F T

FCC 95-____

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314

SECOND NOTICE OF PROPOSED RULEMAKING, TENTATIVE DECISION AND ORDER

Adopted: February __, 1996; Released: February __, 1995

Comment Date: March __, 1996

Reply Comment Date: March __, 1996

By the Commission:

I. INTRODUCTION

1. On November 9, 1995, the U.S. Court of Appeals for the Sixth Circuit in Cincinnati Bell Telephone Co., et al., v. FCC et al. (Cincinnati Bell)[1] granted

[1] Cincinnati Bell Telephone Co., et al. v. Federal Communications Commission and the United States of America, Nos. 94-3701, et al., Slip Opinion (6th Cir., November 9, 1995).

BellSouth Enterprises's Petition for Review of that portion of this Commission's decision in the Broadband PCS Order in which the Commission declined to reconsider the cellular structural separation requirements of Section 22.903 of the Rules, 47 C.F.R. § 22.903.[2] The Court determined that it was arbitrary and capricious for the Commission to have declined to reconsider the structural separation requirements which apply to the provision of cellular service by a Bell Operating Company (BOC) when it concluded that such requirements were not necessary in the context of local exchange carrier (LEC), including BOC, provision of Personal Communications Services (PCS). The Court directed that the Commission proceed promptly with a reconsideration of the Rule.

2. In this Notice, we seek comment regarding how we should resolve the Court's concerns and we tentatively conclude that Section 22.903 should be eliminated from the Rules. We seek comment on that tentative conclusion. We also hereby grant certain interim waivers of and adopt an amendment to Section 22.903.

---

[2] PCS Second Report and Order in GEN Docket No. 90-314, 8 FCC Rcd. 7700, 7751 n.98 (1993) ("Broadband PCS Order").

II. BACKGROUND

3. The cellular structural separation rule, originally adopted in 1981, was designed to limit the ability of AT&T (and, after divestiture, the BOCs) to cross-subsidize the provision of cellular service and discriminate against unaffiliated cellular carriers with respect to interconnection to the landline networks.[3] The rule continues to require the same degree of "maximal separation" which, at that time, was applied to the provision of enhanced services and customer premises equipment under Computer II.[4] While, subsequent to the Final Decision in Computer II, the Commission has

---

[3] See Report and Order, In the Matter of an Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission Rules relative to Cellular Communications Systems, 75 FCC 2d 469 (1981), recon., 89 FCC 2d 58 (1982), further recon., 90 FCC 2d 571 (1982), pet. for review dismissed sub non. United Sates v. FCC, No. 82-1526 (D.C. Cir. 1983); Report and Order, In the Matter of Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services By the Bell Operating Companies, 95 FCC 2d 1117 (1983), aff'd sub nom. Illinois Bell Telephone Co. v. FCC, 740 F.2d 465 (7th Cir. 1984) ("BOC Separation Order").

[4] See Final Decision, In the Matter of Amendment of Section 64.72 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980), recon., 84 FCC 2d 50 (1981), further recon., 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Indus. Ass'n. v. FCC 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

generally replaced structural separation with non-structural safeguards in the case of enhanced services and CPE,[5] we have retained the BOC cellular structural separation rule, pending a separate proceeding regarding the implications of BOC provision of joint local exchange and cellular service.[6]

---

[5] A recent discussion of the history of structural separation is set forth in the NPRM, In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Dkt. No. 95-20, FCC 95-48 at ¶¶ 3-10 (released Feb. 21, 1995).

[6] In the BOC Separation Order, the Commission said that it would review the appropriateness of the cellular structural separation rule relatively soon. BOC Separation Order, supra, 95 FCC 2d at 1140 ("[W]e intend to review the appropriateness of the separation conditions within two years following the BOCs' compliance with the Computer II structural separation conditions, as modified in this order, in light of prevailing circumstances."). In the Notice of Proposed Rulemaking leading to the Broadband PCS Order in this proceeding, the Commission specifically sought comment on the elimination of the Rule, and numerous parties filed comments and reply comments urging elimination of the rule. Notice of Proposed Rulemaking and Tentative Decision in GEN Docket No. 90-314, 7 FCC Rcd. 5676, 5706 (1992) ("[W]e ask for comment on eliminating the BOC separate subsidiary requirement for cellular telephone service."). However, in both the Broadband PCS Order, and in the CMRS Second Report, cited at footnote 9, infra, the Commission declined to reconsider the rule pending a further proceeding.

Nevertheless, the Commission has waived the rule in appropriate circumstances. See Memorandum Opinion and Order in Docket No. CWD-95-5, FCC 95-437 (released Oct. 25, 1995) (granting waiver to Southwestern Bell Mobile Systems to provide competitive landline local exchange service on an integrated basis with its out-of-region cellular systems).

4. In the Broadband PCS Order, this Commission stated that it did "not believe that the record in this proceeding provides enough information for us to eliminate [§ 22.903] at this time. . . ."[7] In that Order, however, the Commission concluded that the non-structural, accounting safeguards were sufficient to protect against possible abuses in the joint provision of local exchange and PCS service and, accordingly, the Commission determined that "no new separate subsidiary requirements are necessary for LECs (including BOCs) that provide PCS."[8] The Commission cited several public interest benefits to be achieved through the joint provision of local exchange and PCS service, including: (a) significant economies of scope; (b) expansion of the PCS networks; (c) a broader range of PCS services at lower costs to consumers; and (d) adapting the wireline architectures to better accommodate PCS services. Id. The BOCs have argued in this proceeding, and elsewhere, that these same benefits would be achieved with respect to cellular service if Section 22.903 was eliminated.

5. The decision not to impose structural separation on the provision of PCS reflected a balance

---

[7] Broadband PCS Order at 7751 n. 98.

[8] Id. at 7751.

between the costs of imposing structural separation requirements and the benefits of not imposing them. In light of the benefits, noted above, and the Commission's conclusion that "the cellular-PCS policies [i.e., the non-structural accounting safeguards] . . . are adequate to ensure that LECs do not behave in an anticompetitive manner," (id.), the Commission decided not to impose structural separation in connection with LEC (including BOC) provision of PCS. The Commission has reached the same conclusion with respect to LEC provision of all other forms of CMRS, but so far has declined to address the issue in the case of BOC provision of cellular service.[9]

III. DISCUSSION

6. The Sixth Circuit determined that it was arbitrary and capricious for this Commission not to have considered eliminating the requirements of Section

---

[9] See Second Report and Order, In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory treatment of Mobile Services, 9 FCC 1411, 1492 (1994) ("CMRS Second Report") (After noting that "[i]n the Broadband PCS Order the Commission decided to impose accounting safeguards, but not structural separation," and deciding to apply the same safeguards "to all CMRS providers with local exchange carrier affiliates," the Commission declined to impose structural separation requirements for CMRS and also declined to address the BOC cellular separation requirements.)

22.903 "given the somewhat contradictory findings of the FCC during the course of the [PCS] rulemaking and related proceedings."[10] It noted that, in the NPRM leading to the Broadband PCS Order, the Commission had specifically solicited comment on whether to eliminate Section 22.903, so as to treat BOC provision of PCS and cellular the same. The Court pointed out that the "FCC noted that the concerns underlying the structural separation requirement . . . could probably be addressed through non-structural safeguards."[11] The Court was influenced by what it described as "perhaps . . . BellSouth's strongest argument" -- that the factual predicate which justified the structural separation requirement is no longer valid.[12] BellSouth had argued that, if non-structural safeguards are sufficient to prevent possible discrimination and cross-subsidization in the provision of PCS, they are also sufficient for cellular service.

7. The Court determined that the Commission had "offered no explanation as to why it believed the record insufficient to eliminate the structural separation

---

10 Cincinnati Bell, slip. op. at 29.

11 Id. at 25.

12 Id. at 27.

requirement, even in light of the fact that it found the requirement unnecessary in the [PCS] context."[13] The Court asked:

> If Personal Communications Service and Cellular are sufficiently similar to warrant the Cellular eligibility restrictions and are expected to compete on price, quality and services, . . . what difference between the two services justifies keeping the structural separation rule intact for Bell Cellular providers?[14]

8. The Court directed this Commission to examine "whether the structural separation requirement placed on the Bells still in any way serves this public interest."[15] While the Court did not set a specific deadline for FCC action, it instructed the Commission to do so "as soon as possible," noting that "time is of the essence" in light of the on-going PCS auction process and the fact that the A and B block PCS licensees are expected to begin providing service soon.[16]

9. We intend to act expeditiously in light of the Court's decision. We believe, as we have said in other

---

[13] Id. at 26.

[14] Id. at 29.

[15] Id.

[16] Id.

contexts, that it is important for this Commission to promote a competitive CMRS environment for all market participants.[17] While we do not believe that PCS and cellular are identical in all respects, and we also do not believe that Section 332 of the Act, 47 U.S.C. § 332, requires identical treatment of all CMRS providers in all circumstances, we recognize that these services are quite similar and we agree with the Court's determination that Section 332 mandates regulatory symmetry among CMRS providers.[18]

10. In light of the Court's decision, we have again reviewed the record in this proceeding, as well as the records in several related (and other) proceedings in which parties commented on whether we should retain Section 22.903.[19]

11. We are also mindful of the fact that dynamic changes have taken place in the telecommunications

---

[17] CMRS Second Report at 1493.

[18] Cincinnati Bell at 28-29.

[19] Specifically, we have reviewed the earlier record in this proceeding, as well as comments, reply comments, and other pleadings regarding the structural separation rule which were filed in Docket Nos. CC-92-115, GN-93-252, ENF 93-44, CC-94-54, and CWD-95-5. Virtually all of those comments and other pleadings called upon the Commission to eliminate or significantly modify Section 22.903.